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WAREHOUSE RECEIPTS.

Warehouse receipts are of comparatively recent origin. They are said to be *quasi*-negotiable, a peculiar phrase of the law by which a distinction is drawn between such instruments and bills of exchange and promissory notes. By statute in some of the States[1] they have been made negotiable, so that the assignee may sue in his own name, both the property and the right of action vesting in him.

The case of Lickbarrow v. Mason,[2] has been often cited as a leading one, establishing the assignability of warehouse receipts, though that case had special reference to the assignable qualities of a bill of lading. The principle was there laid down that the right of stopping goods *in transitu* to an insolvent consignee, may be defeated by a sale to a third person by a transfer and indorsement of the bill of lading for valuable consideration. This judgment was reversed by Lord Loughborough, of the Exchequer Chamber, who held that a bill of lading was not negotiable as a bill of exchange, but assignable, and passed such right and no better as the person assigning had in it. "This proposition," said he, "I confirm by the consideration that actual delivery of the goods does not transfer an absolute ownership in them without a title of property, and that the indorsement of a bill of lading, as it can not in any case transfer more right than the actual delivery, can not in every case pass the property. And I therefore infer that the mere indorsement can in no case convey an absolute property." This judgment was in turn reversed by the House of Lords, Mr. Justice Buller delivering the opinion, and holding that, "every authority which could be adduced from the earliest time, agreed that at law the property passed as absolutely by the indorsement of the bill of lading as if the goods had been actually delivered into the hands of the consignee."

Under the common law, bills of lading were never held on a footing with bills of exchange, and their negotiability in England was only the result of statute law. In the leading case of Thompson v. Dominy,[3] it was held that a bill of lading was not negotiable like a bill of exchange to enable the indorsee to sue in his own name, and that the effect of the indorsement was only to transfer the property in the goods, but not the contract itself; and it was not until the passage of the statutes 18 and 19 Vic. ch. 3, that these instruments were in effect made transferable by indorsement so that the indorsee could bring an action in his own name. By the first section of that act, rights of action and liability upon the bill of lading were to vest in and bind the consignee or indorsee to whom the property in the goods should pass.

The doctrine of assignability was recognized by the Supreme Court of the United States[4] when Mr. Justice Story said: "By the well settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsements of the bill of lading to a *bona fide* purchaser for a valuable consideration without notice of any adverse interests, the latter becomes as against all the world the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement and thus may pass the property." The same principle was held applicable to warehouse certificates by that court in a case[5] where a commission merchant had made advances to the owners of merchandise and received warehouse certificates therefor and an order to deliver the property specified to him. Chief Justice Taney said: "In the opinion of the court it [the certificate] transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailee and held the pork and flour for him. The delivery of the evidences of title, and the orders indorsed upon them, was equivalent * * to the delivery of the property itself." This doctrine

[1] Wisconsin Stat. 1860, ch. 340, ch. 73-91, 1863; Illinois Stat. 1867, p. 180; Kentucky Stat. March 6, 1869, Missouri, Cent. Sav. Bank v. Garrison, 2 Mo. (App.) 58.

[2] 1 Smith's Lead. Cas. pt. 2, p. 1147.

[3] 14 M. & W. 403.

[4] Conard v. Atlantic Ins. Co. N. Y., 1 Pet. 386.

[5] Gibson v. Stevens, 8 How. 384.

has been strictly adhered to by the United States courts,[6] as well as by the State courts, in numerous decisions: In one case where a levy was made upon property transferred to defendants by the delivery of a warehouse receipt, the court decided that the legal effect of such warehouse receipt was to pass the property to the holder, and the levy was unlawful, and said: "Receipts of this kind are like bills of lading, drafts, bills of exchange, etc., instruments *sui generis:* and as such from long and general use in commerce and trade have come to have a well understood import among business men * * * * and this view of the legal effect of such instruments we think fully sustained by authorities cited by counsel, and especially by the case of Gibson v. Stevens."[7] The same court used similar language in a later case,[8] and all of the authorities are conclusive upon this point.[9]

Besides possessing the quality of assignability or *quasi*-negotiability, and in some States of negotiability, warehouse receipts operate as an estoppel upon the maker, and by the delivery thereof he is said to be estopped from denying that he has goods mentioned therein; not that he has the particular goods, however, for while it is held that a warehouseman is estopped by his statement and promises in an ordinary warehouse receipt to deny that he has articles mentioned therein, in an action by an indorsee or assignee who has purchased the paper in good faith,[10] the principle of estoppel has not been held to govern in cases where the description in the receipt does not correspond with the goods which it represents. This was so decided in a case[11] where a warehouseman received a quantity of wheat from the owner upon an agreement to "safely store and keep said wheat until a return thereof should be demanded by said F or his assigns." Upon receipt of each load of the wheat S issued to F memoranda in this form: "No. 711. Account. A. P. Foster, 41.25 bbls. No. 2 wheat. A. P. Foster, 20 sacks. A. P. Foster." The wheat turned out to be of an inferior quality to that represented in the receipt. F sold the wheat to G who sold it to R. At each sale a memorandum was transferred to the purchaser with a written order from F to S directing S to deliver the wheat to bearer. At the time of the purchase R had no knowledge of the amount and quality of the wheat except what appeared from the memoranda. Upon tender of the charges and demand of the wheat S tendered and offered to deliver to R the identical wheat stored, but R refused to receive it. The court held that S was not estopped by the memoranda from showing that the wheat was of a quality inferior to that stated in the certificate, and that his tender and offer to deliver to R the identical wheat was a sufficient offer to perform the contract. The court said: "The memoranda taken alone do not express the terms of any contract. They are a part only of the transactions between the original parties, and their significance is only made apparent by the further facts found, showing the circumstances under which and the purposes for which they were issued. The contract between F and the defendant is not then embodied in the memoranda, and it is not from the consideration of them alone that we are to determine the rights and obligations of the parties to this action * * Even if the memoranda were formal warehouse receipts, fully expressing the terms upon which the wheat was delivered and accepted by defendant, they would not estop the defendant as against F from showing that the wheat received was of an inferior grade. * * The same rule must apply to these memoranda for they are certainly nothing more than receipts." So where in an action upon the following warehouse receipt:[12] "Received in store from M on account of bearer 54 bbls. mess pork, deliverable on return of this receipt and payment of storage," it was contended that defendants were estopped to deny that the barrels contained mess pork and had no right to inspect their contents when in fact they contained salt. Cole, C. J. said: "Now it seems to me that the defendants being warehouse men may well be estopped

[6] Harris v. Bradley, 2 Dillon, 285; McNeil v. Hill, 1 Woolworth, 96; First Nat. Bank Cin. v. Bates; Cin. Law Bulletin, vol. 5, No. 5, S. D. Ohio Swing, J.

[7] Gibson v. Chillicothe Bank, 11 Ohio St. 311

[8] Second Nat. Bank v. Walbridge, 19 Ohio St. 419.

[9] Hale v. Milwaukee Dock Co., 29 Wis. 482; 43 Wis.; Cochran v. Ripy, 13 Bush, 495; Burton v. Curyea, 40 Ill. 320; Cool v. Phillips, 66 Ill. 217; Broadwell v. Howard, 77 Ill. 305; Robson v. Swart, 14 Minn. 370.

[10] McNeil v. Hill, *supra*.

[11] Robson v. Swart, *supra*.

[12] Hale v. Milwaukee Dock Co. 23 Wis. 280.

as against one who takes the warehouse receipt for a valuable consideration from denying the truth of the statements to which it gives credit by its signature, so far as those statements relate to matters which are or ought to be within its knowledge or the knowledge of its agents; but with respect to things not open to inspection and visible like the contents of the pork-barrels, it ought not to be concluded by a description of the property in the receipt. This is the rule applied in the case of receipts or bills of lading given by common carriers as to the interior condition of property shipped, and we can not see why it is not also applicable to the case at bar;" a doctrine which was before enunciated [13] where it was laid down that a bailee who gives a receipt for goods is not bound to open and examine the packages, and that he is not responsible for their contents to one who advances money on the faith of the receipt.

Nor is the warehouseman estopped from showing that he issued by mistake two receipts for the same property, in an action by the assignee of the first receipt against him, in the absence of fraud.[14] Defendants, warehousemen, had received 57 bbls. of oil in storage for Lewis & Son, who were indebted to the Second National Bank of Toledo, plaintiffs. Defendants had issued to Lewis & Son, a warehouse receipt for 15 bbls., part of the 57 bbls., and took up this receipt and issued a new one for the whole 57 bbls., which was indorsed and assigned by Lewis & Son to the plaintiffs and presented by them to defendants. Previous to this defendants had issued a warehouse receipt to Lewis & Son for 42 bbls. of oil, and this receipt had been transferred to the First National Bank of Toledo. After the delivery of the oil to the plaintiffs it was taken from their possession by replevin at suit of the First National Bank. It was shown in evidence that when the receipt for 57 bbls. was given, neither defendants, Lewis & Son, nor the Second National Bank had any actual knowledge of the existence of the receipt for 42 bbls.; that receipt had been obtained and transferred by a former clerk of Lewis & Son, without the knowledge of the partners, and was not entered on the books of the firm. It was issued by a clerk of defendants who was absent from the office when that for 57 bbls. was called for and issued. "In the present case," the court concluded, "it is to be observed that we have in this State no statute affecting the rights of the parties, and, in the absence of such statute, we are of the opinion that defendant is not estopped from showing, as against the plaintiff, the mistake in the issuing of the receipt as a defense to the action."

But where a warehouseman had given a receipt for grain and had stated to one who made advances on the strength of the statement that the holder of the receipt had grain in storage when in fact he had none, the warehouseman was held estopped from denying that he had no grain in storage,[15] in which case the estoppel was held to arise on the false representations of one of the defendants which was directly made to and relied upon by the plaintiff in making his advances. And warehousemen who give their receipts for goods on storage are estopped from setting up a want of seggregation of the goods receipted for from other goods, in an action against them by the holder of the receipt for the conversion of the goods by a seizure in an action against the vendor of the plaintiff.[16]

Where the goods stored have been mixed up with others of the same kind by the warehousemen so that their identity is lost, it has been held that the warehouse receipts can not be regarded as the property or as representing the property of the consignor on account of the receipt of whose grain it is issued, so that parting with that particular receipt by a consignee can be regarded as a disposal of a consignor's property.[17] The court said: "We do not see how, as appellant claims, the warehouseman's receipts can be regarded as the property or as representing the property of the consignor on account of the receipt of whose grain it issued so that the parting with such particular property is a disposal of the consignor's property. The grain on being received at the warehouse is stored in common bins, mixed with other grain, and loses its identity and becomes incapable of specific designation

[13] Grier v. Nickle, 1 Am. Law Reg. 119.
[14] Second Nat. Bank v. Walbridge, 19 Ohio St. 419.
[15] Griswold v. Haven, 25 N. Y. 596.
[16] Goodwin v. Scannell, 6 Cal. 541.
[17] Bailey v. Bensley, 8 Cent L. J. 50.

That amount of grain is credited to the consignee. The warehouse receipt is given to consignee as his voucher that he has in that warehouse not the grain of the consignor nor any particular grain but a certain number of bushels of grain of the kind and grade mentioned in the receipt, subject to his order and disposal."

INJUNCTIONS TO RESTRAIN STATEMENTS AS TO FORMER EMPLOYMENT. II.

We come now to the important case generally cited in questions of this nature, and from the judgment in which some extracts have been already given—Glenny v. Smith, 2 Drew & Sm. 476. One of the employees of Thresher, Glenny & Co., of the Strand, having left their service and opened a shop in Oxford street, placed his own name over the door, but put on the awning and on the door-plates the words, "From Thresher & Glenny." The word "from" was in very small letters so as not to be likely to attract the attention of customers, and on the whole case the learned judge came to the conclusion that deception was probable, and that an injunction must be granted. The fact that the defendant had cautioned one of his shopmen not to permit customers to buy under the impression that they were buying from Thresher & Glenny, so far from being regarded as favorable to the defendant, was held to be against him, as showing that he had contemplated the possibility of deception by the use he was making of his old employers' name.

Very similar to Glenny v. Smith was the American case of Colton v. Thomas, 7 Phila. 257, in which a person who had been in the employ of "The Colton Dental Association" set up in business on his own account as a dentist, and began to describe himself as "Dr. F. R. Thomas, late operator at the Colton Dental Rooms." The words "late operator at the" were in very small letters, so that the distinction between ex-employer and ex-employee was practically obliterated, and an injunction was the inevitable result.

Williams v. Osborne, 13 L. T. (N.S.), 498, was another case before Lord Hatherley, in which he held that former servants of R. Hendrie, a perfumer, were entitled to place on their shop, established after his death, the words "from the late R. Hendrie," and to style themselves on placards "managers and manufacturers to the late R. Hendrie," and to use Hendrie's name on their labels in conjunction with their own, if there were no unfair or untrue statements made; but his lordship pointed out that a certain course of conduct which was begun with no fraudulent intention would be continued with such an intention if no change were made after it had been pointed out that the public were deceived.

In Labouchere v. Dawson, L. R. 13 Eq. 322, the defendant was one of the vendors of a brewery business who, after the sale, set up in business elsewhere, and endeavored to draw away to his new business the old customers of the business he had sold. The same principle as that followed in Burrows v. Foster was adopted, and Lord Romilly held that, while the defendant was entitled to publicly advertise his business, he was not justified in seeking to destroy the value of the business he had sold by drawing away the customers to his new one.

Another of the better-known cases is Hookham v. Pottage, 21 W. R. 47, which came before the lord's justices of appeal in chancery. There, after the firm of "Hookham & E. & S. Pottage" had been dissolved, and the last two partners paid out, so that the business was retained by the senior partner, who began to trade as "Hookham & Co." S. Pottage set up near him, and placed over his shop the words "S. Pottage, from Hookham & Pottage," and as in Foot v. Lea, Glenny v. Smith and Colton v. Thomas, the words denoting the relation between the old business and the new one—*i. e.* "from" and "and"—were in small letters. It was held that the defendant had acted so as to divert to himself custom intended for the plaintiff, and that an injunction must be granted, though if he had confined himself to a fair statement of his connection with the old firm, he could not have been interfered with.

The plaintiff in Robineau v. Charbonnel, V. C. M., May 4, 1876, was a Parisian confectioner, trading at the "Maison Boissier," and the defendants were persons who, after having been in his service, came over to London and opened a shop in Bond-street, and placed in the window the words "*Ex* 1 *eres de la Maison Boissier de Paris.*" The plaintiff having no shop in England no injury could be done him by the defendants' conduct, and no injunction could be granted, but the words "*Ex* 1 *eres de la*" were in very small letters, and the vice-chancellor was of opinion that, on the whole, the conduct of the defendants had not been such as to entitle them to their costs, and no order in that respect was made.

In Dence v. Mason, V. C. M., Feb. 12, 1878, the vice-chancellor held that a former servant of Messrs. Brand & Co., would not have been entitled to represent himself as the original maker of the essence of beef manufactured by that firm, even if he had been the first to discover the recipe, since whatever essence of beef he had prepared had been made by him in the plaintiff's service; but his lordship held that the defendant was at liberty to state fairly that he had been in the plaintiff's service, and that he had become acquainted with the recipe during that period.

In Selby v. Anchor Tube Company, V. C. B., July 19, 1877, the parties had been in partnership as tube manufacturers, carrying on business at Birmingham as "The Imperial Iron Tube Company," and at Smethwick as "The Birmingham Patent Iron and Brass Tube Company." The partnership was dissolved, and the plaintiff thereupon became entitled, under the partnership deed, to the premises at Smethwick and to the styles and goodwill of the firm, and the defend-

ants became entitled to the Birmingham premises. The plaintiff then carried on business alone at Smethwick and also at new works at Birmingham as "The Imperial Iron Tube Company," and the defendants, carrying on business at the old premises in Birmingham, began to put out circulars headed "The Anchor Tube Company (late) the Works of and Partners and Manager in the Imperial Iron Tube Company, Gas street, Birmingham," and to solicit the customers of the old firm. This was held to be an interference with the plaintiff's rights, and an injunction was granted.

The last case to which attention need be directed is that of Fullwood v. Fullwood, 26 W. R. 435, where the plaintiff was carrying on at Somerset place, Hoxton, an annatto business, established, under the name of "R. J. Fullwood & Co.," in 1785, and the defendants, one of whom had formerly been the plaintiff's partner, but had sold his interest to the plaintiff, began to carry on a similar business under the name of "E. Fullwood & Co., and to describe themselves in advertisements as "late of Somerset place, Hoxton, Original Manufacturers of Liquid and Cake Annatto," and to state that their business had been "established in 1785." Mr. Justice Fry held that the course taken by the defendants would probably have the result of causing their business to be mistaken for the plaintiff's, and he granted an injunction, notwithstanding that the plaintiff had delayed commencing his action for a year and a half after he became aware of the defendants' conduct, since the period fixed by the statute of limitations had not expired before the action was brought, which was intended to assert a legal right.

From a comparison of these cases it will be seen that the principles to which we adverted at the outset are well established in practice. Although the circumstances under which those principles have had to be applied have varied in very many particulars, effect has nevertheless been given to those principles, and while a fair use has been allowed to be made of the fact of former employment, fraudulent servants have not been allowed to appropriate their masters' business by the skilful manipulation of that fact. There is no need to establish a fraudulent intention; if the defendant has acted so as to bring about the consequences of fraud it is sufficient, and there is no necessity to inquire further into motives. In examining the circumstances of each case, however, the motives by which the defendant has been actuated will generally be discussed, and it is impossible not to notice in how many cases differences of type have been held to weigh heavily against defendants. No doubt a retired servant is entitled to use his late master's name for the purpose of informing the public that he comes before them recommended by the fact of having been employed in an establishment of admitted reputation, but when he places that name on his door or over his window, he is bound to take special care not to let it be supposed that the name is there placed as being that of the proprietor of the shop. The safest plan in such cases would evidently be to give such words as "from," "late with," "formerly of," in characters of equal size with those in which the name of the late firm appears. Unless probability of deception is avoided, an injunction is to be anticipated even though there has been delay, short of the period fixed by the statute of limitations, and if the proceedings fail on some special ground, still the wrongful conduct may be punished in costs. A former proprietor of a business which has passed to others is legally as well as morally bound not to interfere with the enjoyment of the business and its goodwill by the new proprietors, and the law will not allow him to regain, by private solicitations, the business with which he has publicly parted; though, on the other hand, there is nothing to prevent him from establishing a similar business, if he can do so, independently of his former connection.

FALSE PRETENSES—OBTAINING CONSENT TO JUDGMENT.

COMMONWEALTH v. HARKINS.

Supreme Judicial Court of Massachusetts, November Term, 1879.

An indictment under a statute which provides tha "whoever designedly, by a false pretense, or by a privy or false token, and with intent to defraud, obtains from another person any property * * * * shall be punished," etc., will not lie against one who by false pretenses obtains the consent of a city to the entry of a judgment against it in an action then pending in his favor, and receives a sum of money in satisfaction of such judgment.

COLT, J., delivered the opinion of the court:

The defendant was indicted for obtaining money from the City of Lynn by false pretenses. He moves to quash the indictment, on the ground that it did not set forth an offense known to the law.

It is alleged in substance that the defendant falsely represented to the City of Lynn, through its agent, the city solicitor, that a street which the city was bound to repair had been suffered to be out of repair, and that the defendant while traveling thereon with due care, was injured by the defect; that the defendant at the same time exhibited an injury to his foot and ankle, and represented that it was caused by the alleged defect. It is further alleged that the city and its solicitor were deceived by these representations, and being induced thereby, agreed to the entry of a judgment against the city in a suit then pending in favor of the defendant in this case; and upon the entry thereof paid the amount of the same to him It is not alleged that the suit was to recover damages on account of the defendant's injury from the alleged defect, but we assume that this was so, for otherwise there could be no possible connection, immediate or remote, between the pretenses charged and the payment of the money in satisfaction of the judgment rendered.

In the opinion of a majority of the court this

indictment is defective. The facts stated do not constitute the offense of obtaining money by false pretenses. The allegations are that an agreement that judgment should be rendered was obtained by the pretenses used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged that, after the judgment was rendered, any false pretenses were used to obtain the money due upon it and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay. Com. v. McDuffy, 126 Mass. 467; People v. Thomas, 3 Hi'l, 169; Rex v. Williams, 7 C. & P. 354. A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment obtained by the defendant was reversed the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it can not be said that the money paid upon it was in a legal sense obtained by false pretenses which were used only to procure the consent of the city that the judgment should be rendered.

The indictment alleges the fact of a judgment in favor of the defendant which, if not conclusive as between the parties to this criminal prosecution, is at all events conclusive between the parties to the transaction. To hold that the statute which punishes criminally the obtaining of property by false pretenses, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretenses were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution criminally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property.

Exceptions sustained.

GRAY, C. J., AMES and SOULE, JJ., dissented.

CONTRACT—PERFORMANCE WHEN EXCUSED—ACT OF GOD.

DEWEY v. UNION SCHOOL DISTRICT.

Supreme Court of Michigan, April, 1880.

To excuse the non-performance of a contract, the act of God must be of such a nature as to render its performance impossible; that it renders it difficult or dangerous is not enough. Therefore where a teacher was hired for a certain term, during a portion of which the school was suspended on account of the prevalence of small-pox: *Held*, that he was entitled to recover for the all time.

Error to Alpena County.

Holmes & Carpenter, for plaintiff in error; *Turnbull & McDonald*, for defendant in error.

GRAVES, J., delivered the opinion of the court:

The plaintiff was regularly hired by the district to serve as teacher in its public schools for ten months, for $130 per month. He entered on his duties on the second of September and continued up to the tenth of December, at which time the district officers closed the schools, on account of the prevalence of small-pox in the city, and kept them closed thereafter, for the same reason, until the seventeenth of March. They were then reopened, and the plaintiff resumed his duties. He was subsequently hired for the next school year, and his compensation was increased $100. The district refused to pay him for the period of suspension, and he brought this action to recover it.

The claim was resisted on two grounds: First, that on the second hiring it was mutually agreed that the addition of $100 to his compensation for incoming service should stand and be allowed and accepted in full satisfaction of all claim for pay during the time in question; and, second, that the suspension was the effect of an overruling necessity, or, in other words, the act of God, and that all parts of the contract were suspended for the time being.

The circuit judge submitted to the jury both questions in a very clear manner, and instructed them to find against the plaintiff in case they were satisfied the alleged compromise was in fact entered into, or in case they should find that the small-pox was so prevalent that it became obligatory on the board to close the schools as a necessary step to prevent the spread of the disease and save human life. The jury returned a verdict in favor of the district, but we can not know with legal certainty whether they determined only one of these questions in favor of the district, or whether they so determined both, and, of course, if one only was so decided, it is impossible to say which one. The evidence on the compromise was conflicting, and as it appears in the record the advantage was with the plaintiff. Still, if no other ground of defense had been made, the verdict must have been conclusive. As just explained it is not so now.

The second objection must be briefly considered. Beyond controversy the closing of the schools was a wise and timely expedient; but the defense interposed can not rest on that. It must appear that observance of the contract by the district was caused to be impossible by act of God. It is not enough that great difficulties were encountered, or that there existed urgent and satisfactory reasons for stopping the schools; but this is all the evidence tended to show. The contract between the parties was positive and for lawful objects. On one side school buildings and pupils were to be provided, and on the other personal service as teacher. The plaintiff continued ready to perform, but the district refused to open its houses and allow the attendance of pupils, and it thereby prevented performance by the plaintiff. Admitting that the circumstances justified the officers, and yet there is no rule of justice which

will entitle the district to visit its own misfortune upon the plaintiff. He was not at fault. He had no agency in bringing about the state of things which rendered it eminently prudent to dismiss the schools. It was the misfortune of the district, and the district, and not the plaintiff, ought to bear it.

The occasion which was presented to the district was not within the principle contended for. It was not one of absolute necessity but of strong expediency. To let in the defense that the suspension precluded recovery the agreement must have provided for it. But the district did not stipulate for the right to discontinue the plaintiff's pay, on the judgment of its officers, however discreet and fair, that a stoppage of the schools is found a needful measure to prevent their invasion by disease, or to stay or oppose its spread or progress in the community, and the contract can not be regarded as tacitly subject to such a condition.

The judgment must be reversed, with costs, and a new trial granted.

CAMPBELL and COOLEY, JJ., concurred.

CHATTEL MORTGAGE — WHEN VOID IN PART AND GOOD AS TO RESIDUE.

DAVENPORT v. FOULKE.

Supreme Court of Indiana, March, 1880.

1. Where a chattel mortgage provides that the mortgagor may retain possession of the mortgaged property and use the same, and it is apparent from the nature of the property that the only reasonable use the mortgagor can make of it is to sell it, such mortgage is void on its face as to other creditors of the mortgagor. But if such permission applies only to a portion of the mortgaged property the mortgage will be valid as to the portion not so affected.

2. If by any arrangement, express or implied, the mortgagee allows the mortgagor to continue to sell the mortgaged goods at retail for his own benefit, the mortgage will be unavailing against judgment creditors of the mortgagor.

NIBLACK, J. delivered the opinion of the court:

The complaint in this case averred that on the 6th day of July, 1875, the defendant, John T. Davenport, executed two promissory notes, for $325.00 each, to the plaintiff, John F. Foulke, payable, one in one year, and the other in two years from date; that to secure the payment of said notes the said Davenport executed to the plaintiff a chattel mortgage upon a fire-proof combination lock safe, certain show cases, trays, fixtures and tools, in a silversmith shop and jewelry store, together with many other miscellaneous articles consisting of merchandise pertaining to the business of a silversmith and jeweler and such as are usually exposed to sale as a part of such business, said mortgage containing a proviso as follows: "And provided also that until default of payment of said notes, or one of them, I am to keep possession of said granted property and to use and enjoy the same, but if the same or any part thereof shall be attached or executed at any time by any of my creditors, or if I should attempt to remove the same from the City of Richmond without the assent of the said John F. Foulke, then it shall be lawful for the said John F. Foulke, his executors, administrators or assigns, to take immediate possession of the whole of said property and place the same in the hands of the marshal of the City of Richmond or some constable of Wayne township, to be advertised and sold," etc.; that at the time of the execution of said mortgage the said Davenport was a resident of Wayne county, and that said mortgage was duly recorded in said county within ten days after its execution; that afterwards and within less than a year several persons obtained judgments against the said Davenport and caused executions to be issued upon their judgments and to be levied upon the mortgaged property, the defendants, Augustus B. Gillett and George W. Jennison, being two of such judgment creditors; that the said mortgaged property was then in the possession of the said Gillett and Jennison and one David J. Dozier, who was also made a defendant, from all of whom the possession of such property had been demanded. Wherefore the plaintiff demanded a foreclosure of his mortgage and sale of the mortgaged property.

A demurrer to the complaint having been interposed and overruled, Davenport answered separately in general denial, and Gillett, Jennison and Dozier answered jointly in three paragraphs: 1. Specially denying that Davenport was a resident of Wayne county when the mortgage was executed. 2. Alleging that they had purchased the mortgaged property of Davenport with the assent of the plaintiff. 3. Setting up special matter having the supposed tendency to establish the fraudulent character of the mortgage. Issue was joined on the second paragraph of this last-named answer and a demurrer was sustained to the third paragraph. The cause having been submitted to a jury for trial there was a general verdict for the plaintiff. After overruling a motion for a new trial, the court rendered judgment against Gillett, Jennison and Dozier for a foreclosure of the mortgage and a sale of the mortgaged property, but refused to render any judgment, either personal or otherwise, against Davenport. All the defendants below have appealed. Errors are properly assigned.

The appellants contend that by the terms of the mortgage sued on, Davenport was authorized to sell the mortgaged property and apply the proceeds to his own use, and that for that reason the mortgage was void as to other creditors of Davenport, and hence insufficient as the foundation of a cause of action.

In the case of Mobley v. Letts, 61 Ind. 11, it was held that where it was provided in a chattel mortgage that the mortgagor should retain possession of the mortgaged property and use the same until default be made, and where it was apparent from the nature of the property that the only reasonable use the mortgagor could make of

it would be to expose it to sale and to sell it, such mortgage was void on its face as to other creditors of the mortgagor; because under such provision, as applicable to such property, the mortgagor would be authorized to sell the property and apply the proceeds to his own use. That case is well sustained by the authorities referred to in the opinion, as well as by numerous other authorities in Herman on Chattel Mortgage, commencing with page 238. Voorhis v. Longsdorf, 31 Mo. 451.

In the well-considered case of Burnett v. Fargus, 51 Ill. 352, the Supreme Court of Illinois recognized the doctrine that a chattel mortgage which permits the mortgagor to sell the mortgaged property and apply the proceeds to his own use is void, but at the same time held that such a permission to sell only a portion of the mortgaged property did not necessarily render the mortgage void *in toto*; that the mortgage might be valid as to that portion of the property which the mortgagor was not authorized to sell. The rule laid down in this last named case impresses us as being both a just and reasonable rule and as one which we ought to follow. State v. Tasker, 31 Mo. 445; State v. D'Oench. Id. 453.

Under the rules of construction laid down as above, the mortgage before us was evidently void as to the articles of merchandise enumerated in it against other creditors, but as to those other articles which were such as are commonly in daily and permanent use in a silversmith's shop and jewelry store combined, and not ordinarily for sale, we think the mortgage was *prima facie* valid. As to the articles last named, the reservation of the right to the mortgagor to use and enjoy them until default, did not necessarily carry with it by implication the right of the mortgagor to sell and convert those articles to his own use.

The mortgage being valid on its face as to a portion of the mortgaged property, the court did right in overruling the demurrer to the complaint.

The third paragraph of the answer of Dozier and others, to which a demurrer was sustained, was substantially as follows: That after the execution of the mortgage, the said Gillett and Jennison, being wholesale dealers, residents in the City of Indianapolis in this State, and having no actual knowledge of such mortgage, sold to Davenport, goods, wares and merchandise on credit, to the aggregate sum of nearly $900, for which they obtained judgment against the said Davenport and levied an execution on said mortgaged property; that to secure the payment of their judgment, they, the said Gillett and Jennison, were compelled to purchase such property and to pay off prior execution liens upon the same, all of which was done with the knowledge of the plaintiff; that after the execution of the mortgage the said Davenport retained possession of the mortgaged property and, with the knowledge and consent of the plaintiff, kept said property in his store exposed to sale and sold portions of the same every day, applying the proceeds to his own private use and benefit, and not to the payment of the debt secured by the mortgage. Wherefore it was claimed that the mortgage set out in the complaint was fraudulent and void as to the said Gillett and Jennison as well as to the said Dozier.

Herman on Chattel Mortgages, at page 235, says: "If, by any arrangement, express or implied, the mortgagee allows the mortgagor to continue in the sale of the mortgaged goods at retail, for his own benefit, the mortgage will be unavailing against a judgment creditor of the mortgagor, and such arrangement or permission may be shown by circumstances. It is not the simple fact of possession by a mortgagor that will avoid the mortgage, but it is the possession with the power of sale which defeats the instrument, and the effect will be the same although neither expressed nor necessarily implied from its terms. If the right to possession and power of sale in the mortgagor appear upon the face of the instrument it will be fraudulent in law, but if it do not appear upon its face, but in evidence at the trial, it will be fraudulent in fact." What is thus said by Herman is also well sustained by authority. Ogden v. Stewart, 29 Ill. 122; Horton v. Williams, 21 Minn. 187. State v. Tasker, *supra*.

The facts set up in the third paragraph of answer in this case amount, as we construe them, to an allegation that the plaintiff had waived all right of lien on the mortgaged property and that by reason of such waiver such property had, in good faith and for a valuable consideration, passed into the hands of other creditors of Davenport.

As thus construed and in the light of the authorities lastly above cited, we are of the opinion that this third paragraph of answer was well pleaded and was consequently erroneously held bad upon demurrer. For this error the opinion will have to be reversed.

Judgment reversed.

CONSTITUTIONAL LAW—STATUTORY EXEMPTION FROM JURY SERVICE.

NEELY v. STATE.

Supreme Court of Tennessee, April Term, 1880.

The exemption by statute of directors in a railroad company from jury service is unconstitutional, as granting a peculiar privilege or exemption which is not extended to the members of the community generally. Hawkins v. Small, 7 Baxt. 193, overruled.

DEADERICK, C. J., delivered the opinion of the court:

Neely was regularly summoned as a juror at the January term, 1880, of the Criminal Court at Memphis. He failed to attend as required, and was fined $25, from which judgment of the court he has appealed to this court.

The defense relied on is that Neely was when summoned and still is a director in the Memphis and Charleston Railroad Company, and that the charter granted in 1848 exempts the directors from jury service. It is admitted that he

was and still is a director in said company, and that said company was chartered in 1848, containing the exemption stated, and that Neely believed he was not liable to perform service as a juror. The court held the provision of the charter granting the exemption inoperative and void, because repugnant to the Constitution. We are of opinion that the holding of his honor, the judge of the criminal court, is correct. It is an attempt to pass a law for the benefit of individuals, inconsistent with the general laws of the land, and purports to grant to individuals who may be directors in said company, privileges, immunities and exemptions, which are not extended to other members of the community who may be able to bring themselves within the provisions of such law, contrary to the provisions of art. 11, sec. 8, of the Constitution.

Counsel for Neely have cited the case of Hawkins v. Small, 7 Baxt. 193, in support of the validity of the exemption contained in the charter of said company. The case cited does sustain the position assumed. But it does not appear that the constitutionality of the provision in the charter in that case, exempting a section hand from working on the public roads, was considered. Of course the constitutionality of the provision must have been taken for granted, otherwise the result announced could not have been attained. But the opinion does not discuss the validity of the exemption, but reaches the conclusion in favor of the exemption upon other grounds, stated in the opinion.

We are of opinion, however, that the case was erroneously decided, and overrule it, as it is liable to the same constitutional objections which lie against the case at bar.

Let the judgment be affirmed.

NOTE.—1. The constitutional provision enforced in the foregoing opinion denies to the legislature the power to "pass any law granting to any individual or individuals, rights, privileges, immunities or exemptions, other than such as may be, by the same law, extended to any member of the community who may be able to bring himself within the provisions of such law." While the authority of the courts has not been frequently invoked for the enforcement of this provision of the Constitution, yet the principle has been often applied in giving effect to another requirement of the same Constitution, under which "the law of the land" has been defined to mean laws "which extend to and embrace all persons who are or may come into the like situation and circumstances." Alexandria v. Dearmon, 2 Sneed, 121; Vanzant v. Waddel, 2 Yerg. 259; Wally v. Kennedy, Id. 555; State Bank v. Cooper, Id. 605; Budd v. State, 3 Hum. 492; Pope v. Phifer. 3 Heisk. 701.

The principle governing Neely's Case is thus seen to be one well understood and of familiar application in Tennessee; and it has now been successfully invoked to overthrow a statutory exemption from jury service of over thirty years standing. The exemption which was under consideration in the case of Hawkins v. Small, 7 Baxter, 193, now overruled, was of a different character, namely, an exemption of railroad servants from liability to work upon the public roads. The court in sustaining this exemption said: "It was perfectly competent for the legislature to exempt this class of persons from road duty, and it was a wise exercise of legislative discretion." This plainly assumed without discussion the constitutionality of the exemption in question, and, inferentially, of all similar immunities.

2. The principal case is noticeable as being not only subversive of the well-established practice in Tennessee, but as the first case in which such a statutory exemption from jury duty has been considered open to constitutional objections. Various questions have arisen respecting these and similar exemptions; and the constitutional question has sometimes been presented; but it has always heretofore been taken as clear that the legislature might properly grant such exemptions, in its discretion, as in Hawkins v. Small, *supra*. In Bloom v. State, 20 Ga. 443, the exemption of firemen from jury duty was held to be so clearly constitutional as not to deserve argument, and was sustained as a practice sanctioned by long usage; although the fact that "by reason of these exemptions, more than 500 of the best men of the county are withdrawn from jury duty," was suggested as a warning to the legislature. In State v. Williams, 1 Dev. & Bat. Law, (N. C.) 372, the exemption of postmasters from jury duty under the act of Congress of 1825, was sustained as constitutional, as much, however, on the ground of comity as otherwise. Without any consideration of constitutional objections similar exemptions from jury service were sustained in State v. Whitford, 12 Ired. Law, (N. C.) 99, and Albert v White, 33 Md. 297. The constitutionality of a statutory exemption from military duty was affirmed in Swindle v. Brooks, 34 Ga. 67.

3. In this connection a reference to cases deciding collateral questions incident to these exemptions may not be inappropriate. Chief among these is the question whether the exemption is a legislative contract, granting a vested right, or a mere gratuity, revocable at the pleasure of the legislature. Judge Cooley, in his work on Constitutional Limitations, in laying down the doctrine that all statutory exemptions from public duty are mere privileges, which may be at any time withdrawn by the legislature, cites first in order the class of exemptions from jury service (p. 383); and his view is expressly approved in a case of exemption from such service in Reappeal of Scranton, 74 Ill. 161, where the repeal of the exemption was sustained. This decision was re-affirmed in Bragg v. People, 78 Ill. 328, where the right of the legislature to recall such an exemption is carefully examined on constitutional grounds. The same conclusion was reached in *Ex parte* Rust, 43 Ga. 209, which approves the action of the legislature in paying due attention to the warning uttered in Bloom v. State, *supra*. The repeal of an exemption from jury service was sustained without constitutional discussion, in State v. Ingraham, 1 Cheves (S. C.) 78. In like manner an exemption from military service may be revoked. Commonwealth v. Bird. 12 Mass. 443. And homestead exemptions may be modified. Bull v. Conroe, 13 Wis. 238.

The exemption being but a personal privilege may be waived by the beneficiary, and does not disqualify him from service if he chooses to waive it. State v. Forshner, 43 N. H. 89; State v. Wright, 53 Maine, 328; Munroe v. Brigham, 19 Pick. 368; Davis v. People, 19 Ill. 74; State v. Adams, 20 Iowa, 486. One who is under such a statute exempt from regular service may, however, be required to serve as a talesman. State v. Hogg, 2 Murphey, (N. C.) 319: State v. Willard, 79 N. C. 660. An invitation to extend the statutory exemption of militia men from jury duty to the case of an "honorary member" of a militia company, was gracefully declined, in Stewart v. State, 23 Ga. 181.

5. A judicial view of the duty of all classes of citizens in the Commonwealth to render to the public their several shares of necessary jury service may be found in the following language of O'Neall, J,, in State v. Ingraham, 1 Cheves (S. C.) 78. "I think a little service in the jury box might not be useless to one of the gallant sons of the stormy deep, who is often called upon to bear his country's standard to far distant shores. As a juror, he would learn much of the civil institutions of his country to which he was before comparatively a stranger, and he would thus have it in his power to compare them with foreign institutions, or with more perfect knowledge to protect some fellow-citizens' right against the aggression of foreign governments. This duty, instead of being regarded an onerous one, ought to be cheerfully and promptly borne by every man, the rich and the poor, the high and the low. The perfect equality of the jury box is the best practical exposition of legal liberty."

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

NATIONAL BANKS—ACTION — CONSTRUCTION OF FEDERAL STATUTE.—The provision in relation to suits against National banks of United States Revised Statutes, sec. 5198, that "suits, actions and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases:" *Held*, to apply to transitory actions only, and not to such actions as are by law local in their character.—*Casey v. Adams*. In error to the Supreme Court of Louisiana. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

ADMIRALTY PRACTICE — APPEAL TO CIRCUIT COURT.—An appeal in admiralty from the district court to the circuit court vacates the decree appealed from. The case is heard *de novo* in the circuit court, without any regard to what was done below. An entire new decree is entered, which the circuit court carries into execution. The cause is not remanded to the district court. After the suit once gets into the circuit court it is proceeded with substantially in the same way as it would have been if originally begun in that court. The Lucille, 19 Wall. 74; Montgomery v. Anderson, 21 How. 388; Yeaton v. United States, 5 Cranch, 283.—*The Louisville v. Halliday*. Appeal from the United States Circuit Court, Southern District of Illinois. Opinion by Mr. Chief Justice WAITE. Decree affirmed.

EXECUTOR—MAY NOT PLEDGE PROPERTY OF TESTATOR IN AID OF FIRM WHERE TESTATOR WAS PARTNER.—Where a testator in his will mentioned an interest in a firm acquired by funds belonging to him and certain of his relations, and desired that such interest be continued in the firm under the control of his brother, who was executor under his will, so long as the brother should deem it advisable: *Held*, that this did not give authority to the executor to invest the general assets of the estate in the business of the firm. Burwell v. Mandeville, 2 How. 560. And the law would impute knowledge to those receiving what they knew were assets of the estate in pledge for firm indebtedness that such pledge was a misuse of them in the absence of authority in the will to the executor to pledge them. *Held*, also that the assets pledged might be recovered back from the pledgee by the administrator *de bonis non* of the estate appointed after the resignation of the executor making the pledge. There is no doubt that, unless restrained by statute, an executor can dispose of the personal assets of his testator by sale or pledge for all purposes connected with the discharge of his duties under the will. And even where the sale or pledge is made for other purposes, of which the purchaser or pledgee has no knowledge or notice, but takes the property in good faith, the transaction will be sustained; for the purchaser or pledgee is not bound to see to the disposition of the proceeds received. But the case is otherwise where the purchaser or pledgee has knowledge of the perversion of the property to other purposes than those of the estate, or the intended perversion of the proceeds. The executor, though holding the title to the personal assets, is not absolute owner of them. They are not liable for his debts, nor can he dispose of them by will. He holds them in trust to pay the debts of the deceased, and then to discharge his legacies; and as in all other cases of trust, he is personally responsible for any breach of duty. And property thus held, acquired from him by third parties with knowledge of his trust and his disregard of its obligations, can be followed and recovered. The law exacts the most perfect good faith from all parties dealing with a trustee respecting trust property. Whoever takes it for an object other than the general purposes of the trust, or such as may reasonably be supposed to be within its scope, must look to the authority of the trustee, or he will act at his peril. Colt v. Lasnier, 9 Cow. 320; Miller v. Williamson, 5 Md. 219; Thomasson v. Brown, 43 Ind. 203; Field v. Schieffelin, 7 Johns, Ch. 150; Petrie v. Clark, 11 Serg. & Rawle, 377; *Ex parte* Garland, 10 Vesey, 110: *Ex parte* Richardson, 3 Madd. 138; Pitkin v. Pitkin, 7 Conn. 307; Lucht v. Behrens, 28 Ohio St. 238.—*Smith v. Ayer*. Appeal from the United States Circuit Court for the Northern District of Illinois. Opinion by Mr. Justice FIELD. Decree reversed.

MUNICIPAL BONDS—IRREGULARITIES IN ISSUE—WHEN VOID IN HANDS OF INNOCENT HOLDER.—In February, 1872, the township of M, in Missouri, duly voted to issue its bonds in aid of a railroad. On the 30th of March in that year, a statute was enacted by the legislature of Missouri requiring all municipal bonds to be registered in the State auditor's office and certified by the State auditor as a condition of validity. In June, 1872, the county court of the county in which M was situated, as provided by law, ordered the issue of the bonds voted and directed that they be registered as required by the act mentioned. One Purcell was presiding justice of this court in March, 1872, and continued to be such until the following September, when he resigned and was succeeded by one Merwin. In October, 1872, the bonds were issued signed by Merwin as presiding justice. They were antedated as of March 28, 1872. They were never registered or certified as required by the act of March 30, 1872, but were put upon the market and sold by the authorized agents of the township. *Held*, that the bonds were invalid for the want of registering, and this defense could be set up against an innocent holder for value without notice. Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it. Plaintiff is charged with notice of the fact that Merwin was not the presiding justice of the county court until October, 1872, and that he could not have signed the bonds in his

official capacity until that time. Meyanwega v. Alling, 99 U. S. 112, distinguished.—*Anthony v. County of Jaspar.* In error to the United States Circuit Court, Western District of Missouri. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

CONSTITUTIONAL LAW — REMOVAL OF COUNTY SEAT—CONTRACT—INTERPRETATION.—In the year 1846, the legislature of Ohio passed an act whereby it was provided that the county seat of Mahoning county should be "permanently established" at Canfield, upon the fulfillment of certain prescribed terms and conditions which were fully complied with. The county seat was established accordingly, and remained at Canfield for about thirty years. In 1874 the legislature passed another act providing for its removal to Youngstown. This bill was filed, setting forth that the act of 1846, and what was done under it, constituted an executed contract within the meaning and protection of the contract clause of the Constitution of the United States, and praying for a perpetual injunction against the removal contemplated by the later act. *Held*, 1. That the contract clause of the Constitution had no application. 2. That the act of 1846 was a public law relating to a public subject, with respect to which a prior had no power to bind a subsequent legislature. 3. Conceding there was a contract as claimed, it was satisfied on the part of the State by establishing the county seat at Canfield, with the intent that it should remain there. 4. There was no stipulation that the county seat should be kept or remain there in perpetuity. 5. The rule of interpretation in cases like this, as against the State, is that nothing is to be taken as conceded but what is given in express and explicit terms or by an implication equally clear. Silence is negation, and doubt is fatal to the claim.—*Newton v. Commrs. of Mahoning Co.* In error to the Supreme Court of Ohio. Opinion by Mr. Justice SWAYNE. Judgment affirmed.

SUPREME COURT OF RHODE ISLAND.

October Term, 1879.

BILL OF LADING—REFUSAL BY MASTER OF VESSEL—ACTION.—A loaded B's vessel with coal consigned to C. A dispute arising between A and the master of the vessel as to a charge made by A for trimming the cargo, the master refused to sign the bill of lading and sailed without signing any bill of lading. The coal was delivered to the consignee C and accepted. *Held*, that C, the consignee, was liable to B for the freight. *Held, further*, that C could not deduct from the freight due to B the charge for trimming made by A. Opinion by POTTER, J.—*Hatch v. Tucker.*

MARRIAGE AT COMMON LAW — AGREEMENT.—1, Betrothal followed by copulation does not make the common law marriage "*per verba de futuro com copula*," when the parties looked forward to a formal ceremony and did not agree to become husband and wife without it. Cohabitation following a marriage promise is *prima facie* evidence but not conclusive of consent between the parties to become husband and wife *de presenti*. *Query*, whether there being no prohibitory language in the statute, a so-called common law marriage is valid in Rhode Island. 2. By an antenuptial agreement, each of the parties released all claim arising from the marriage to the property of the other. The intended husband had considerable personalty but little realty; the intended wife had little personalty, but expected to inherit some realty. *Held*, that as the marriage would give to the wife no interest in the husband's personalty of which he could not deprive her, and might give to him a curtesy in her realty, the agreement was not without consideration nor was it grossly inequitable. Opinion by DURFEE, C. J.—*Peck v. Peck.*

ATTORNEY AND CLIENT—AUTHORITY TO SUE—ATTORNEY'S LIEN ON JUDGMENT.— B sued A, and judgment was given in favor of A for his costs. Subsequently A's attorney brought debt on this judgment against B, using the name of A. It coming to the knowledge of the court that this action was brought without authority from A: *Held*, that the action was not legally brought. *Held further*, that A not being legally in court the action must be dismissed without costs. 2. An attorney's lien on a judgment in his client's favor originates in the control which by his retainer the attorney has over the judgment and the legal process which enforces it. This enables him to collect the judgment and reimburse himself. It gives him no right to exceed the authority given by the retainer. The attorney has, however, to the amount of his fees and expenses, an equitable right to control the judgment against his client and his opponent, if in collusion with his client, which the court at its discretion will protect and enforce. So the court will, if possible, protect the attorney in matters of equitable set-off. This is the full scope of the attorney's lien, so called. The lien does not authorize a suit on the judgment without the client's consent and direction. Opinion by DURFEE, C. J.—*Hunter v. Champlin.*

EXECUTORS — LIABILITY FOR BONDS STOLEN FROM VAULT—TRUSTEE.—1. A testator directed his executors within two years after his death to invest the sum of $5,000 "in such stocks or other productive property as tney may deem advisable, in their names as executors," for the benefit of his grandson, the trust fund to be paid over to the grandson when twenty-five years of age. The executors, within the time limited, opened an account in their books in which they charged themselves as trustees and credited the grandson with $5,009. They invested this sum in three United States 7-30 coupon bonds, and two coupon bonds of the State of Rhode Island. These bonds they put into an envelope labelled "Investment of five thousand dollars for" the grandson, with the date of the purchase, put this envelope into a tin box, and put the tin box into the vault of a bank in Providence. *Held*, that by these acts of the executors the trust for the grandson was properly and legally constituted. 2. The bank vault was robbed and the bonds lost. Subsequently the executors, by giving indemnity, obtained through an agent, whom they had reason to believe honest, the issue of new United States bonds in place of those stolen. The agent appropriated the bonds, and but a portion of their value could be recovered. *Held*, that the executors or trustees were not liable for the loss caused, either by the robbery of the vault or by the theft of the agent. In managing trust property the trustee must use as much care as prudent men ordinarily adopt in their own business—more can not be required of him. 3. The The trustee depoisited in a saving's bank the money recovered from the agent. *Held*, that this investment complied with the directions of the will. Opinion by DURFEE, C. J.—*Carpenter v. Carpenter.*

SUPREME COURT OF INDIANA.

April, 1880.

TAXES—LIEN OF ON CROPS—PERSONAL LIABILITY OF PURCHASER OF LAND FOR.—In this case a

mortgage on certain land was foreclosed and the land bought in at sheriff's sale by the mortgagee. Afterwards the mortgagor leased the lands for a year, and the tenant put in crops, and still later he conveyed the land by deed to B for $1,000, which B then owed him. At the time of the sheriff's sale there were taxes due on the land amounting to $198, and shortly after the conveyance to B the mortgagor instigated the treasurer to levy on B's interest in the growing crops raised by the tenant, and sell the same to satisfy the taxes, which he did. *Held*, that the facts did not show any cause of action in favor of B against appelle, the mortgagor. By its purchase of the land the appellee did not become personally liable to pay the delinquent taxes. Although such taxes would have remained a perpetual lien on the land until paid, and might have been collected by the sale of it, yet they could not have been collected by the seizure and sale of other property of the appellee. But if by the deed to B he acquired an inteaest in the land and in the crops growing thereon, not only the land but the crops as long as they remained on the land were as much liable to the lien and payment of the delinquent taxes in B's possession as if it had remained in the possession of the mortgagor or had passed at once, under the sheriff's sale, into the appellee's possession. Affirmed. Opinion by HOWK, C. J.—*Blodgett v. German Savings Bank.*

WAGERING CONTRACT — CONDITIONAL SALE OF PROPERTY.—In October, 1876, appellee proposed to sell appellant a wagon worth $120 for the sum of $5 absolute and the further sum of $240 if Samuel J. Tilden should be elected President of the United States. The proposition was accepted and the wagon delivered to appellant. After the result of the election was known appellant tendered appellee $5, which was refused, and this action was brought to recover the wagon or its value from appellant. *Held*, that the contract was void as being a wager. The arrangement by which appellee was to receive $5 absolutely was merely a colorable one and did not change the real nature of the transaction. By the delivery of the wagon and the subsequent acquiescence in the mode of payment the wager becomes an executed one on the part of appellee, and in such cases the law affords no relief, but leaves the parties where it finds them. Judgment reversed. Opinion by NIBLACK, J.—*Davis v. Leonard.*

BURGLARY—OWNERSHIP OF PROPERTY ENTERED —VARIANCE.—The indictment charged that appellant burglariously entered the "storehouse of Susannah Diggs," and with the larceny of the goods of Goolope Wright. It appeared in evidence that Susannah Diggs was the owner of the fee of the storehouse entered, but that the same, at the time of the entry, was in the exclusive possession and occupancy of Wright, as tenant of Mrs. Diggs. *Held* that in legal contemplation the property entered was the property of Wright, he being in exclusive possession under his lease, and during the continuance of the lease he was as absolutely the owner as if he had the fee in the property. The variance between the name of the owner of the storeroom alleged and that proven was fatal. 2 Russell on Crimes, 29; 2 Whart. Crim Law. sec. 1571; 2 Arch. Crim. Plead. and Prac. 8th ed., 1097. Judgment reversed. Opinion by WORDEN, J.—*McCrilles v. State.*

TELEGRAPH COMPANIES — FAILURE TO TRANSMIT MESSAGE — STATUTORY CONSTRUCTION. — Appellee sued appellant for failure to transmit a telegraphic message under the statute requiring telegraph companies, under a penalty of $100, to promptly transmit messages. The complaint referred to appellant as "engaged in the business of transmitting telegraphic messages for hire." *Held*, that these words are not the equivalent of those words used in the statute, to wit, "engaged in telegraphing for the public." It is a public fact which the courts must know that there are telegraph companies which confine their telegraphing generally to their private business, as along railroad lines, and are not "engaged in telegraphing for the public," although they may frequently send messages for hire; and there is no reason why they may not send messages for persons who employ them for hire, thus making themselves liable to the party for a breach of the special undertaking, but not subject to the public penalty. Yet if the complaint were held sufficient, such companies might be made amenable to the statute. Appellee insists that as the courts must notice the corporation of the appellant as a part of their public knowledge, they must also know that it is "engaged in telegraphing for the public." This view can not be approved. A court can not create a penalty by construction, but must avoid it by construction, unless it is brought within the latter and necessary meaning of the act creating it. Judgment affirmed. Opinion by BIDDLE, J.—*Western Union Telegraph Co. v. Axtell.*

SUPREME COURT OF OHIO.

May, 1880.

AGREEMENT IN RESTRAINT OF TRADE.—A voluntary association of salt manufacturers was formed for the purpose of selling and transporting that commodity. By the articles of association all salt manufactured or owned by the members, when packed in barrels, became the property of the company, whose committee was authorized and required to regulate the price and grade thereof, and also to control the manner and time of receiving salt from the members; and each member was prohibited from selling any salt during the continuance of the association except by retail at the factory and at prices fixed by the company. *Held*, that such agreement was in restraint of trade, and was void as against public policy. Judgment affirmed. Opinion by MCILVAINE, C. J.—*Central Salt Co. v. Guthrie.*

INDICTMENT FOR ASSAULT TO KILL—WHEN COURT SHOULD APPOINT AN ASSISTANT PROSECUTOR.—1. An indictment in which it is averred that P assaulted and purposely wounded B with intent to kill him, of which wound B died, sufficiently charges that P purposely killed B. 2. A court of common pleas held by a single judge has power under the act of 1875 (75 Ohio Laws. 47, sec. 8), to appoint an attorney to assist the prosecuting attorney in the trial of any case pending in such court; and the rule is not different in Hamilton county, although the prosecuting attorney and an assistant prosecuting attorney appointed under § 9 of the same act, be present and participate in such trial. 3. The court should not appoint an attorney, under said sec. 8, to assist in the trial of one charged with crime, merely because the prosecuting attorney, the injured person, or his friends, request that such appointment be made, nor unless, in the opinion of the court, the public interest requires such appointment; but where such appointment has been made it will be presumed, in the absence of any showing to the contrary, that it was properly made. Motion overruled. Opinion by OKEY, J.—*Price v. State.*

PLEADING—FIRE INSURANCE — MISREPRESENTATIONS—MORTGAGE.—1. The plaintiff attached to and filed with his petition, and as part thereof, a copy of

the policy of insurance on which his action was founded. On trial in the common pleas and on error to the district court, the copy of the policy was treated as part of the petition without objection by either party. *Held*, that it is not error in a reviewing court to treat said policy as part of the petition. 2. Where, in a policy of insurance, the written application is referred to and expressly made part of the contract, such application thereby becomes part of the same as fully as if embodied in the policy. 3. One condition of the policy was, "and any false representations made by the assured of the condition or occupancy of the property, or any material facts—material to the risk," avoids the policy: *Held*, that representations concerning a matter material to the risk contained in the application, if untrue in fact, avoid the policy whether made intentionally or otherwise. 4. In said application the question was: "Is the property incumbered? If so, state to what amount and the value of the premises." Ans. "Yes; mortgage $2,000—10,000;" when the fact was this mortgage, which was made by the insured, was $3,200 principal and $240 accrued interest. *Held*, that this was a false representation material to the risk, which avoided the policy. 5. It was a condition of the policy that "if the property be sold or transferred, or any change takes place in the title, either by legal process or otherwise, * * * * without the consent of the company, the policy shall be void." This condition was not broken by the execution of a mortgage on the property without such consent. Judgment of the district court affirmed and the cause remanded. Opinion by JOHNSON, J.—*Byers v. Farmers' Ins. Co.*

SUPREME COURT OF MISSOURI.

October Term, 1879.

BANK — BY-LAW OF, CONSTRUED.— Where a by-law of a banking corporation provided that "no transfer of stock should be allowed as valid so long as the holder should be in arrears to the bank or in any manner indebted to it:" *Held*, that this did not embrace an indebtedness arising from an original subscription upon which the stockholder had paid all that had been called for. Reversed. Opinion by NAPTON, J.—*Kahn v. Bank of St. Joseph.*

CONSTITUTIONAL LAW — DOUBLE DAMAGE FOR KILLING STOCK.—The main question in this case is, whether sec. 43 of the Railroad Act (Rev. Stats. 1879), making railroad corporations liable in double damages for stock killed in consequence of a failure to erect and maintain fences, etc., is in violation of the Constitution of the United States or the State of Missouri. Defendant contends that said section is obnoxious to Art. 5 of the amendments to the Constitution of the United States, which declares that "no person shall be deprived of life, liberty or property without due process of law;" and to art. 9, which declares that "no State shall deprive any person of life, liberty or property without due process of law." In Barret v. Atlantic, etc. R. Co., 68 Mo. 56, 7 Cent. L. J. 428, it was held that this section was not in conflict with art. 2, sec. 40 of the Constitution of Missouri, which is an exact copy of art. 5, above cited, for the reason that it is a penal statute intended chiefly to secure the safe transportation and protection of passengers on railroad trains, and being an exercise of the police power of the State, was valid. Upon the same principle the section is not obnoxious to the above quoted provisions of the Constitution of the United States Affirmed. Opinion by NORTON, J.— *Spealman v. Pacific R. Co.*

CONDITIONAL SALE OF PERSONAL PROPERTY — RENTING—LACHES.—May 17, 1871, the A. Sumner Company delivered one Ray an organ on the following written contract: "This is to certify that I have this day hired of the A. Sumner Company one organ, style three, No. 33,790, of the value of one hundred and sixty-five dollars, to be used only by my family at my residence in Edina, Mo., and not to be removed therefrom without the consent of the A. Sumner Company in writing. I agree to pay for the rent of said organ ten dollars per month in advance, payable on the 17th day of each month, at the office of the A. Sumner Company, 415 N. Fifth street, St. Louis, without demand whatsoever being made therefor. This contract may be terminated by the A. Sumner Company at any time if the rent is not paid as above agreed, or they may have reasonable cause to fear for the safety of said organ. I agree to take good care of said organ and to return the same in good order to the said A. Sumner Company, at the expiration of the term for which the rent was paid in advance. (Signed) W. C. Ray. It is agreed between the A. Sumner Company and W. C. Ray, that if said W. C. Ray shall desire to purchase said organ that he may have the privilege of so doing at any time during the continuance of this contract, by the payment to the A. Sumner Company of the sum of one hundred and sixty-five dollars, in which case all sums paid for rent will be deducted from said sum, but the privilege to purchase said organ shall in no way interfere with the right of the said A. Sumner Company to control said organ (all property remaining in them the same as though this privilege of purchase had not been added to this contract) until the purchase money is paid in full. (Signed) A. Sumner Company, W. C. Ray." Ray sold and delivered the organ to one Cottey, June, 1871, who took the same without notice of the contract under which Ray held it. Cottey held the organ until July, 1874, paying in the meantime the purchase money, when Sumner demanded the organ, and soon after commenced suit for its value. *Held*, that the instrument above copied was not a conditional sale of the organ, but a renting; that Ray had no title and could convey none to Cottey, and that Sumner was entitled to recover the organ or its value without reference to the question of laches. (The following cases are to the contrary: Greer v. Church, 13 Bush. (Ky.) 430; Lucas v. Campbell, 88 Ill. 447; Price v. McAllister, 3 Grant's Cas. (Pa.) 248; Machine Co. v. Anderson, 23 Minn. 57; Reed v. Abbey, 2 N. Y. Sup. Ct. 380.) Affirmed. Opinion by HENRY, J.—*Sumner v. Cottey.*

SUPREME COURT OF ILLINOIS.

March, 1880.

CRIMINAL LAW—BURGLARY—"STABLE" A BUILDING.—A "stable," as that word is commonly used and understood, is the equivalent of "building," and is therefore included in the statute defining burglary, in that class of structures denominated "other buildings." Affirmed. Opinion by SCOTT, J.—*Orrell v. People.*

STATUTE OF LIMITATIONS— CONSTRUCTION OF "NONSUITED."—The twenty-fourth section of the limitation act which provides, among other things, that "if the plaintiff be non-suited, * * he may commence a new action within one year," refers only

to an involuntary nonsuit and not to a voluntary one. A voluntary nonsuit is an abandonment of a cause by a plaintiff, and an agreement that a judgment for costs be entered against him. An involuntary nonsuit is where a plaintiff, on being called when the case is before the court for trial, neglects to appear, or where he has given no evidence upon which the jury could find a verdict. Affirmed. Opinion by WALKER, J.—*Holmes v. Chicago, etc. R. Co.*

USURY—BONUS — CONSTITUTIONAL LAW.—1. A bonus bid for a loan from a stockholder of a building association which increases the interest upon such loan above the legal rate is usurious. 2. The act incorporating the building association (sec. 10) provides as follows: "No premiums, fines or interest on such premiums that may accrue to the said corporation according to the provisions of this act shall be deemed usurious, and the same may be collected as other debts of like amount may be collected by law in this State:" *Held*, that this section is in violation of two of the clauses of sec. 22, of art. 4, of the Constitution, namely, that prohibiting the regulating of interest on money, and that prohibiting the granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise by special or local law. Affirmed. Opinion by SCHOLFIELD, J.—*Monticello Building Assn. v. Smythe.*

PROMISSORY NOTE—FAILURE OF CONSIDERATION—WARRANTY—PAROL EVIDENCE.—1. In a suit on a promissory note given for the price of personal property, parol evidence of a warranty of the property and its breach is admissible. 2. Where the bill of sale of a lot of ice did not show to whom the sale was made, the quantity, nor the price per ton, but simply that the ice was sold by the vendor, describing its location and stating that it was to be removed between its date and the first of April following: *Held*, that as it would not constitute a contract between the parties without the aid of extrinsic evidence, parol evidence was admissible to show that the sale was made with a warranty, on a plea of failure of consideration to an action on the note given for the price. 3. If a seller makes a distinct assertion of the quality or condition of the article sold, whether it amounts to a warranty or not, which he knows or should know is untrue, with a view to induce another to buy, and the other relies on and believes the assertion to be true, and relying thereon purchases and damages ensue, he may maintain an action of deceit, or is entitled to set them off in an action by the vendor for the purchase money. 4. In an action upon a note given for ice purchased, where fraud and a breach of warranty are set up in defense, it is not correct to instruct the jury that even if the statements made were untrue as to the quantity of the ice, the purchaser could not complain unless he relied solely on such statements as being true in making the purchase. It is sufficient if he would not have made the purchase but for such statements, though he may, in part, have relied on other facts. Reversed. Opinion by WALKER, C. J.—*Ruff v. Jarrett.*

SURETY—SIGNING BOND IN BLANK—SETTLEMENTS OF TREASURER—INTEREST.—1. A party executing a bond knowing that there are blanks in it to be filled up by inserting particular names or things necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed the bond. 2. The failure of an officer to file his official bond within the prescribed time is not *ipso facto* a forfeiture of the office, and may be waived by a subsequent acceptance and approval of the bond by the proper authorities, and the sureties can not afterwards avail themselves of the fact of its not being filed in time. 3. Where a city treasurer is elected as his own successor, as respects balances in his hands at the close of his first term, if he entered them in his treasury books as actually come to his hands from his predecessor, and continued from time to time to return and report the same as in his hands, both he and his sureties would be concluded in an action on his bond for the second term from denying that these balances did actually come to his hands as treasurer. 4. Where the law specially requires a city treasurer to make and keep his accounts, and to make statements thereof, at specified periods, under oath, and to make certain monthly and annual reports, also under oath, in respect to his receipts and disbursements and balances on hand, these acts being within his official duties, for the performance of which the conditions in his official bond provide, in an action on such bond the sureties will be concluded from showing that the amount so appearing as treasury balances in the hands of their principal, was not actually in the treasury at the time. 5. Nor would it be competent in such case for the sureties to prove that a part of the balance shown by the treasury books, reports, etc., to have been on hand at a certain time, was actually loaned out for the benefit of the city, because there being no authority for the treasurer so to employ the public money, the fact if proven would simply show a breach of the bond. 6. Where a treasurer of public funds receives interest from the use or loaning of such funds, such interest will not belong to the officer as the perquisites of his office. Judgment of appellate court reversed. Opinion by SHELDON, J.—*City of Chicago v. Gage.*

SUPREME COURT OF IOWA.

March-April, 1880.

FORGERY—ALTERATION OF NOTE, WHEN NOT.—The alteration by the payee of a note, of a memorandum of payment indorsed on the back thereof by himself, not signed, is not a forgery for which he is liable to indictment. Affirmed. Opinion by ROTHROCK, J.—*State v. Davis.*

"CIVIL DAMAGE" LAW—PRACTICE.—1. Under the civil damage law of Iowa (Code, §§ 1557, 1558) the seller of liquors and the owner of the premises may be joined in one action. 2. Either of the defendants is entitled to have a jury trial, as the question of the sale, the injury and consent of the owner are all legal questions. 3. The lien under the law is established by statute and not by the court. The required facts being found, the lien follows as of course. Reversed. Opinion by SEEVERS, J.—*Loan v. Hiney.*

GAMBLING—BILLIARDS — REFRESHING MEMORY OF WITNESS — SUMONING GRAND JURORS FROM BYSTANDERS.—1. Playing billiards where the loser of the game pays a certain sum to the owner of the table for its use is within the statute against gambling. 2. A writing examined by a witness for the purpose of refreshing his memory, need not, to be admissible, be in his own handwriting. 3. The requisite number of grand jurors having been summoned but only a part of them having appeared, the court directed the sheriff to fill up the panel which he did from the bystanders, without having any process or serving any process upon them: *Held*, that the motion to quash the indictment because no process was issued to the sheriff was properly overruled. Affirmed. Opinion by ROTHROCK, J.—*State v. Miller.*

ADOPTION—STATUTE MUST BE STRICTLY OBSERVED.—The statute of Iowa as to adoption requires

that the instrument evidencing the act shall be acknowledged by all the parties and shall be recorded in the recorder's office in the county where the person adopting resides, and shall be indexed with the name of the parents by adoption as grantor, and the child as grantee, in its original name, if stated in the instrument. Upon the execution, acknowledgement, and filing for record of such instrument, the rights, duties, and relations between the parents and child by adoption shall thereafter, in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth. R executed an instrument in writing acknowledging one Mary A. Waldof as his own child in accordance with the statute, but the paper was not filed until three days after R's death. *Held*, that the adopted child could not inherit from R. "The right of inheritance is purely a statutory right, and therefore arbitrary, absolute and unconditional. Nevertheless, the provisions of the statute must prevail, although to do so, in some instances, is inconsistent with our views as to what constitutes natural rights, or justice and equity. Therefore, a child by adoption can not inherit from the parent by adoption unless the act of adoption has been done in strict accord with the statute. The statutory terms and conditions are that the written instrument must be executed, signed, acknowledged, and filed for record. When this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child can not inherit from the parent by adoption. The filing for record is just as important, in a statutory sense, as the execution or acknowledgment. One may be dispensed with as well as another, for the right depends solely on the statute." Affirmed. Opinion by SEEVERS, J.—*Tyler v. Reynolds.*

SUPREME COURT OF WISCONSIN.

March-April, 1880.

CONTRACT — MUTUAL OBLIGATIONS — DAMAGES — OPINION EVIDENCE. — 1. On a contract by which plaintiff undertook to get out and deliver to defendants a certain quantity of logs, while defendants were to furnish plaintiff all necessary supplies for men and teams, where it appears that, in consequence of defendant's failure to perform on their part, plaintiff was able to deliver only a part of the logs, plaintiff is entitled to recover, not only the profits which he would have realized from the delivery of the logs which he was prevented from delivering, and the contract price of those actually delivered, but also the extra expense in delivering the latter which was caused by defendants' fault. 2. Plaintiff, as a witness in his own behalf, was permitted to state the actual cost of putting in the logs delivered, and what it would have cost him had he been well supplied by defendants: *Held*, no error. 3. Another witness for plaintiff, who had been employed by him in getting out the logs, and had been engaged in lumbering, "doing almost all kinds of work" connected therewith for many years, was permitted to state his opinion as to whether plaintiff with the force he had could have continued, if well supplied, to put in the same amount of logs per day which (as he testified) they had put in daily for some days: *Held*, that the evidence was of the nature of expert testimony, and admissible. Affirmed. Opinion by COLE, J.—*Salvo v. Duncan.*

TRESPASS—ATTACHMENT—NOTICE.— 1. The complaint alleges that on, etc., defendant broke and entered upon plaintiff's farm, and took from his possession certain personal property of the plaintiff, carried it away and converted it to his own use. *Held*, an action *de bonis asportatis*, and not of trover. 2. According to the general tendency of modern decisions, one who does an act under a lawful authority will not be rendered a trespasser *ab initio* by subsequent irregularities, except where he does or consents to some positive act which goes to show that the original lawful act was done with an unlawful purpose. 3. Accordingly, the plaintiff in an attachment suit in justice's court may justify a taking of defendant's goods under a valid attachment, although the subsequent judgment against the attachment defendant and sale of goods on execution are invalid, for the reason of a subsequent failure of the justice to cause notice to such defendant to be posted and published as required by law where personal service of the writ is not made, and through such attachment plaintiff received a portion of the money made on the execution. Affirmed. Opinion by COLE, J.—*Grafton v. Carmichael.*

LIABILITY OF MUNICIPAL CORPORATION FOR INJURIES FROM CHILDREN COASTING ON STREETS.— 1. For injuries suffered by one passing along or over a public street in a city caused by collision with persons "bobbing" or "coasting" on such street, the city is not liable as for "insufficiency or want of repair" of the street, under sec. 1339, Rev. St. 2. While the use of a public highway in a city for "coasting" may be a public nuisance, its suppression is a police duty, and not a duty in which the corporation, as such, has a particular interest, or from which it derives any special benefit in its corporate capacity; and for the non-performance of such duty by its officers and agents the corporation is not liable. Hayes v. Oshkosh, 33 Wis. 314; Little v. Madison, 42 Wis. 643, distinguished. 3. The complaint avers that, prior to the time of the injury, the defendant city, its servants, agents and officers, "did license boys and girls to slide down hill in said city, and that under such license and permission the young men, boys and youths" in said city "did use the streets of said city, and particularly Poplar street, to slide down hill with sleds," etc. *Held*, that, in view of the whole complaint, the word "license" must here be construed as expressing only an omission of the officers to perform their police duty by restraining such use of the street; and that no cause of action, therefore, is stated; although a positive license granted by the common council would have rendered the city liable. Reversed. Opinion by LYON, J.—*Schultz v. City of Milwaukee.*

SUPREME COURT OF PENNSYLVANIA.

January-March, 1880.

DEVISE — RELIGIOUS USE — MONEY TO BE EXPENDED IN MASSES.—A bequest of "all the rest, residue and remainder" of testator's estate to a church, "to be expended in masses for the repose of my soul," is a religious use within the meaning of the statute, and therefore void, if made within one calender month of the death of the testator. Reversed. Opinion by STERETT, J.—*Rhymer's Appeal.*

MUNICIPAL CORPORATIONS—STREETS, OBSTRUCTIONS IN—NUISANCE—NEGLIGENCE—NOTICE.—1. It is the duty of a municipality to keep its streets in proper repair and condition. The degree of care required in such cases varies according to the character of the locality. What is or is not negligence, in a

particular case, is generally a question for the jury. 2. In an action against the city of Allegheny for injuries received in consequence of the plaintiff's horse taking fright at the carcass of a horse which had been lying in one of the defendant's streets for about twenty-four hours, in the month of August: *Held* (reversing the judgment of the court below), that it was for the jury to say whether the defendant was guilty of negligence in not removing the nuisance. Reversed. Opinion by MERCUR, J.—*Fritsch v. City of Allegheny.* 18 W. N. 318.

CORPORATION — BY-LAWS—REASONABLENESS OF A QUESTION FOR THE COURT — MANDAMUS. — 1. A volunteer fire engine company who, owing to new municipal regulations, had ceased to extinguish fires, sold their engine and other personalty, leased their engine house, and had several thousand dollars in the treasury, without any explained or avowed object passed a by-law by which they raised the monthly dues from 12 1-2 cents to $2. In a proceeding by *mandamus*, at the suit of a member of the company whose name had been erased from the books for non-payment of the increased dues: *Held*, that such a by-law was under the circumstances unreasonable, and that no member who did not assent was bound to pay the increased rate; *Held, further*, that such member continued to hold rights in common with the other members, and that, when the company was finally dissolved, and its property was to be distributed among its members, he was entitled to a share therein. 2. Whether a by-law is reasonable or not is a question for the court solely. But its unreasonableness should be demonstrably shown. The court will not scrutinize it for the purpose of holding it void, nor hold it invalid if every particular reason for it does not appear. Affirmed. Opinion by TRUNKEY, J.—*Hibernia Fire Engine Co. v. Commonwealth.* 8 W. N. 320.

STATUTE OF FRAUDS — PAROL PROMISE TO PAY DEBT OF ANOTHER, WHEN NOT WITHIN STATUTE —CONSIDERATION—ESTOPPEL.—A owed B a sum of money; C promised B that if he would give time, he, C, would see B paid, alleging that he had funds in his hands belonging to A. B agreed not to push, but did not give up his claim against A, and subsequently reduced it to judgment. *Held*, that C's promise was not within the statute of frauds, and could be enforced. *Held, further*, that C was estopped from denying that he had property of A in his hands. When the promise is to apply property of the debtor in the hands of the party, it is not necessary that the creditor should give up his recourse against the debtor upon the original claim. The promise is not a collateral one, but an original one, founded on sufficient consideration. Affirmed. Opinion PER CURIAM.—*Dock v. Boyd.* 8 W. N. 138.

PROMISSORY NOTE— ILLEGAL CONSIDERATION — VIOLATION OF UNITED STATES STATUTE IMPOSING PENALTY.—A, being the owner of a distillery and a quantity of whisky, sold the same to B, receiving as part payment a promissory note which he subsequently had discounted at a bank. A did not have a license to sell whisky, nor were the barrels marked in accordance with the directions of the United States statutes. In a suit on the note brought by the bank against B: *Held*, that as the statutes did not prohibit the sale of whisky, but only imposed a penalty for their violation, the note was not void. *Held, further*, that the sale did not make A a whisky dealer within the meaning of the statute. Holt v. Green, 23 Sm. 198, distinguished. Affirmed. Opinion PER CURIAM.—*Rafter v First Nat. Bank.* 8 W. N. 139.

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — FAILURE OF TRAVELER IN CROSSING RAILROAD TRACK TO STOP, LOOK AND LISTEN— BAILEE CAN NOT RECOVER FOR INJURY TO PROPERTY IN HIS POSSESSION.—1. The failure to stop, look and listen before crossing a railroad track for the approach of trains is no bar to an action for an injury to the plaintiff's property resulting from another and entirely different cause. 2. The plaintiff, before crossing the defendant's railway track did not stop, look and listen for approaching trains. From the testimony it appeared that even if the plaintiff had stopped, he would not probably have seen or heard an approaching train. In crossing the track the hoof of his horse caught in the flange-way, which, there was considerable evidence to show, was out of repair. After about two minutes' unsuccessful efforts to release him, a train coming up the track ran over the horse and damaged the buggy and harness. The court below nonsuited the plaintiff because he had neglected to stop, look and listen before attempting to cross the track. *Held*, to be error. The rule invoked that a traveler must "stop, look and listen" before driving across a railroad track is a valuable one, and sustained by several well-considered cases. We do not propose to depart from this principle nor to weaken its force. We are unable to see its applicability to this case however. The injury was not the result of a failure to observe the rule. 3. The horse belonged to the plaintiff, but the wagon and harness had been borrowed by him from another person. *Held*, that the owner of the wagon and harness was the proper person to sue for injury to the same. A recovery by the plaintiff would be no bar to a suit by the owner. Affirmed. Opinion by GORDON, J.—*Baughman v. Shenago etc. R. Co.*

MECHANICS' LIEN—WHEN LIEN CAN BE FILED FOR IMPROVEMENTS MADE AT INSTANCE OF LESSEE —EFFECT OF NOTICE TO MECHANIC THAT LESSOR WILL NOT HOLD HIMSELF LIABLE.—1. Where a tenant contracts with his landlord to make certain repairs for compensation to be made by the landlord either in money or the occupation and use of the premises, the tenant acts as the agent of the landlord, and the land can be bound by a mechanic's claim for repairs so made at the instance of the tenant. 2. Notice by the lessor to the mechanic that the latter is to look only to the lessee does not destroy the mechanic's right to the security of the land. 3. A leased certain premises to B for five years at the rent of $5 for the first year, $500 for the second, and $600 for the following year; the lessees agreed that they would during the first year, in consideration of the low rent, make certain repairs, "at their own expense and cost." A mechanic's claim being filed against the premises for repairs so made at the instance of the lessees, and a *scire facias* issued thereon: *Held*, that the premises were bound by the lien. Affirmed. Opinion PER CURIAM.—*Hall v. Parker.* 8 W. N. 325.

CONTRACT—PAROL AGREEMENT TO LEASE PREMSES—MEASURE OF DAMAGES FOR BREACH.—1. An action lies for the breach of a parol aareement to lease, but the damages recoverable are such only as result directly from the breach. Nothing can be recovered from the loss of the bargain, nor is the rent agreed to be reserved in the lease admissible as a measure of damages. 2. No claim being made by the lessor for moneys specially expended in pursuance of the agreement to lease, his damages are merely nominal. Reversed. Opinion by GORDON, J.—*Sausser v. Steinmetz.*

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

35. In trespass *de bonis asportatis* by two, does a denial of their title and right of possession put in issue their joint interest? In other words, could either recover without proof of the other's right of possession.

A. B.

36. A conveys land to B, which conveyance is never recorded. B conveys to C, which deed is recorded, but C never exercises any act of ownership over the land. A conveys the land to D. D has knowledge of deed from B to C. Is he bound to inquire of B & C, how they came to get this land, or is he justifiable in completing his purchase, A asseverating that he knows nothing about the B & C conveyance. KANSAS.

37. A has a suit pending against an estate in which B the administrator is duly served. Judgment goes against A in State court of last resort. Immediately after, and without service on A, or any knowledge on his part, B has himself removed. No administrator d. b. n. is appointed. A in proper time appeals to U. S. C. Ct., and serves citation on B. Before citation issued, a receiver was appointed by court of chancery. The receiver was also served with citation. Motion to dismiss in U. S. C. Ct. for want of service on proper party. Should the motion prevail? See Fairfax v. Fairfax, 5 Cranch. 19, n. 1, Curtis' ed. W. W. M.

Augusta, Ga.

38. A brings suit in a probate court to cancel her father's will, with prayer that she be recognized as his legitimate heir. The court enters an order annulling the will and recognizing her heirship. A sells land in another State, part of the estate of her father, to B, who brings suit for the land. Is the judgment of the probate court competent evidence for B against a stranger to prove the heirship of his vendor, A? *

39. By statute, as between attaching creditors, the attachment first served has the prior lien, without reference to date of judgment obtained thereon. As between judgments generally, the oldest has the prior lien, This is true also where a general judgment comes in conflict with a judgment on attachment. A levies an attachment. B subsequently attaches the same property. B gets the first judgment. C next gets general judgment against same debtor. Last of all A gets judgment. Which has priority? See 3 Kelly, (Ga.) 169. W. W. M.

Augusta, Ga.

40. The Constitution of California provides that "taxation shall be equal and uniform throughout the State," and a statute of the State provides that "any property discovered by the assessor to have escaped assessment for the last preceding year, may be assessed at double its value." A owned land in the State which escaped assessment for the fiscal year 1878-9, and was by the county assessor in pursuance of said statute doubly assessed for 1879-80. The rate of tax for 1878-9 was $1.50, and for 1879-80 $3 on each $100 of value. Question: 1st. Is said statute constitutional? And 2nd. Can the tax on land of A assessed at double its value and rate of taxation, $3, be enforced? W. H. S.

[See State v, Moss, 69 Mo. 495, 9 Cent. L. J. 165, and cases cited.—ED. CENT. L. J.]

41. A executes a title bond to B, conditioned upon the payment of a certain sum of money. B makes default in his payments, and A files a bill to foreclose B's equities, and obtains a decree. Both die, leaving heirs. B's heirs file a bill to open up the decree obtained by A, alleging some informality, and praying a specific performance of A's contract, which is granted upon the payment into court of B's originally delinquent payments, etc. The question is, upon the performance of these conditions do B's heirs take title under a commissioner's deed, as of date of the deed, or as of the date specified in the original bond for the execution of the deed? J. P.

La Fayette, Ind.

42. A by will devised to his four children, B, C, D and E, four pieces of land of equal value, lying in different counties in Indiana, to be divided among them. After his death the children made partition deeds to each other of the four pieces of land. When B went to his land he found it occupied by a stranger, who claimed to own it under a written contract of purchase with A. The stranger's title was held good in all the courts, and B got nothing by his partition deed. What remedy has he against C, D & E? Are there any adjudicated cases upon this point? G. B. C.

New Albany, Ind.

ANSWERS.

9. [10 Cent. L. J. 118.] My answer to this question may be found 10 Cent. L. J. 338. While that answer is correct as the query is put, the querist may be misled, because of the omission of a material qualification, not noticed by me; viz.: If the purchaser at the execution sale had no notice of the equity, but purchased in good faith, paying a valuable consideration (as if he pays expenses of sale and applies balance in payment of his execution debt), and records his conveyance without notice of the unrecorded equity, he would get the preference. Wood v. Chapin, 13 N. Y. 509; Barto v. Tompkins Bk, 15 Hun, 11; Hetzel v. Barber, 69 N. Y. 1; Freeman on Judgments, § 366, 366 *a*; Freeman on Executions. § 336 Jones on Mortgages, § 460-463. But it then becomes a question under the recording acts.

Sherburne, N. Y. D. L. A.

22. [10 Cent. L. J. 298.] (In answer to this query, B. B. Boone, Mobile, Ala., cites Chandler v. Cheney, 37 Ind. 391; Fisher v. Provin, 25 Mich. 347; and D. J. M. L., Neosho, Mo., Ketchum v. Walsworth, 5 Wis. 95. See 10 Cent. L. J. 318, 378.—ED. CENT. L. J.)

19. [10 Cent. L. J. 259.] A judgment does not operate as a lien upon property, either real or personal, which is exempt from levy and sale under an execution. See Freeman on Judgments, Pool v. Reid, 15 Ala. 826; Cook v. Baine, 37 Ala. 350; Smith v. Allen, 39 Miss. 469; Moseley v. Anderson, 40 Miss. 49; Vaughan v. Thompson, 17 Ill. 78; Finley v. Sly, 44 Ind. 266. Now if the personal property which was exchanged for the wagon was free from any lien, then it seems clear that the wagon received in exchange for personal property would be free from lien, and exempt from sale under execution, provided it does not exceed in value the statutory exemptions. At common law all of the property of the judgment debtor would have been liable for the satisfaction of the judgment. Exemptions being created by statute and being in derogation of the common law must be construed strictly, therefore to entitle a party to the benefits of a statute there must be a strict compliance with its terms. The piece of land received in exchange for the personal property is not exempt from sale under an execution, as it is not occupied as a homestead as is required by statute. B. B. BOONE.

Mobile, Ala.

25. [10 Cent. L. J. 318.] A, having left his home and not

being heard from for more than seven years thereafter was, at the expiration of the seven years, presumed to be dead. Whiting v. Nicholl, 46 Ill. 230; 1 Greenleaf on Ev., § 41. His return alive, after the purchaser at the guardian's sale had gone into possession, could not have the effect to disturb the title acquired by virtue of the order of the probate court. The action of that court was in itself evidence of A's death sufficient to protect the purchaser. Newman v. Jenkins, 10 Pick. 515; but see Doe dem. Lloyd v. Deakin, 4 Barn. & Ald. 433. X.
Chicago, Ill.

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25. [10 Cent. L. J. 318.] A, never having been deprived of his legal title to the land by "due process of law," has a better title than the purchaser under sale by guardian. The purchaser had access to the records of the probate court, and hence bought with notice of all facts connected therewith. See Lavin v. Emigrant Industrial Savings Bank, U. S. C. C. South Dist. N. Y., April 1, 1880, and cases cited, 9 Rep. 541, L. B.
Brunswick, Mo.

[J. H. F. sends a similar answer, and another subscriber refers to Freeman on Void Judicial Sales, sec. 4, where it is said: "Courts of probate have no power to grant letters of administration nor letters testamentary on the estate of a living person. Letters may be granted under a mistake of fact upon the supposition that the testator or other person is dead. The case is nevertheless one in which the court has no jurisdiction. If he who was supposed to have died is, in fact, living, all probate sales and other proceedings are void and can have no effect on his title;" citing Duncan v. Stewart, 25 Ala. 408; Griffith v. Frazier, 8 Cranch, 9; Fisk v. Norvel, 9 Tex. 13; Jochumsen v. Suffolk Sav. Bk., 3 Allen, 87; Withers v. Patterson, 27 Tex. 496; Beckett v. Selover, 7 Cal. 237.—ED. CENT. L. J.]

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27. [10 Cent. L. J. 338.] No. The Fifth and Sixth Amendments to the Constitution of the United States are intended solely as limitations on the powers of the general government, and have no application to legislation by the States in reference to their own citizens. "They are exclusively restrictions upon federal power." Fox v. State, 5 How. 434; Baron v. Mayor, 7 Pet. 243; Twitchell v. Com., 7 Wall. 321; Smith v. Maryland, 18 How. (U. S.) 71; Colt v. Eves, 12 Conn. 243. D. L. A.
Sherburne, N. Y.

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32. [10 Cent. L. J. 398.] I think the querist means us to understand that A remains in charge of his herd, having them under his present control. If so the cattle clearly are not "running at large" in the sense of those words used in statutes of the kind he cites. Russell v. Core, 46 Vt. 600; Wright v. Clark, 50 Vt. 130; s. c. 28 Am. Rep. 496; Thompson v. Corpstein, 52 Cal. 653; Roberts v. Barns, 27 Wis. 422; Walters v. Glats, 29 Iowa, 437; Kinder v. Gillespie, 63 Ill. 88; Hall v. Gildersleeve, 36 N. J. L. 235; Colton v. Maurer, 5 T. & C. 481. Judge Peck, in Russell v. Cone, *supra*, says: "Running at large is used in the statute in the sense of strolling without restraint or confinement, or wandering, roving or rambling at will, unrestrained." Such are the kinds of trespassing animals designed to reach by these summary statutes. The Kansas statute as cited aims at no other. They have not assumed to give a lien upon all animals found trespassing, but only upon those trespassing while "running at large." The liability of the owner in the case put, must be sought for by the usual action of trespass at common law, or under other statutes. These summary statutes have not been extended by judicial construction, beyond the strict wording of the law. D. L. A.
Sherburne, N. Y.

CURRENT TOPICS.

A new question in what we might term the yet unsettled Law of Telephones was determined last week in the circuit court of this city. The American Union Telegraph Company having been unable to obtain from the Bell Telephone Company the privilege of an instrument in their office applied to the court for a *mandamus* to compel the company to accede to their request. After argument the court overruled the motion to quash the alternative writ. Thayer, J., who delivered the judgment, held that the principles of law applicable to railroad companies and other common carriers unquestionably applied to telegraph and telephone companies. Having established their lines and adopted a uniform mode of serving the public consistent with their chartered powers, they must treat all persons similarly situated with respect to those lines alike, and without unjust discrimination. It is not for them to select whom they will serve, or impose conditions of service on one class of customers that do not apply equally to all persons occupying the same relative position toward the company. It was conceded by the court that if the respondent had contented itself with erecting its lines and establishing its affairs at certain designated points, and had stationed its own agents at such offices to receive and transmit messages, as is usual with telegraph companies, it could not have been compelled, at the request of any private person or corporation, to place instruments in private offices or residences, and establish private stations for the use of particular individuals or corporations. If it had elected to use its franchise in the manner last indicated, its duty to the public would have compelled it to receive and transmit such messages as were tendered at its own offices to its own agents, without discrimination as to persons or as to the price charged for such service. And it could not have been compelled to assume other obligations or render other service to the public. "But if it erects its main line along a certain street or streets," said the court, "under a power granted in its charter to use public highways for that purpose, and under a charter granting it the power to condemn land for the construction of a telephone line, and if it elects to serve the public by furnishing instruments to residents along such line for private use, and by making connections between such instruments and its main lines; above all, if it holds itself out to the public as prepared to furnish such instruments and make such connections for all who may apply, then I should say that its duty to the public compels it to treat all residents along such line with absolute impartiality. It can not grant such facilities or render such service to one citizen or corporation and refuse like privileges to his next door neighbor. The charter of the respondent was not granted for any such purpose, nor does it confer upon the corporation any such power to discriminate among its customers. According to the averments of the petition, the respondent has adopted the mode of transacting business within the City of St. Louis last above indicated. Instead of maintaining offices in charge of its own agents for the reception and transmission of messages at certain designated points, it supplies instruments to residences, offices and hotels contiguous to its main line and makes all proper connections with such main line at uniform rates, and holds itself out to the world as prepared to supply all persons with such facilities for communication who reside or occupy offices contiguous to its established lines. Such being the established mode of transacting business adopted by the respondent, according to the averments of the bill, it follows, from the principles above stated, that in re-

fusing to grant to the relator such facilities as it affords to other customers it has violated an imperative public duty imposed upon it by law."

Will some one be good enough to tell us something about Mr. Anthony Comstock of New York? Who is he? What are his duties and powers? From extracts which we find in the newspapers concerning this individual, he seems to be regarded by a certain class of publishers in about the same light that the Russian student of revolutionary ideas regards a member of the Czar's police. We learn from these extracts that he claims to be the guardian of the morals of the American Nation. We learn likewise that if a work of art happens to be more true to nature than he believes it should be, or if a book or pamphlet contains any thing which in his opinion even grown up people ought not to know, this remarkable person has only to shake his head to have the offensive works disappear from public view. Thus a New York storekeeper was exhibiting in his window a copy of an historical work by a Dutch painter, when Mr. Comstock happening that way nodded his head, and the picture was not. Still later, we learn, he has looked upon M. Zola's latest novel, and "Nana" is to be read no more by the people of the United States, that is if the publishers are foolish enough to obey his nod. There is something ludicrous in this—in the idea that any one man in this country shall decree for its citizens what they shall see and what they shall read. We recommend the publishers of the American edition of "Nana," and all other publishers, not to be frightened, and we herewith tender them a little legal advice for which we will charge nothing. This is that if Mr. Comstock or any one else undertakes to seize any picture, or book, or other article which they may manufacture or sell, upon his own conclusion that it is obscene, indecent or immoral, let them commence at once an action of trespass against him. He will then find out what no one so far, we judge, has attempted to teach him, that a man's property can not be taken from him without "due process of law." He will then probably realize the fact that the office of Guardian of the Public Morals is one which is beset with difficulties, and which is hardly worth holding. We commenced these remarks with three questions and we will conclude them with two more. Is there in this Republic such an officer as a Public Censor, clothed with dictatorial powers, and not responsible to the people? Is this Mr. Comstock the same person who has been more than once charged by publishers with seeking to obtain money from them by blackmail? If any one can answer these queries we shall be obliged to him.

RECENT LEGAL LITERATURE.

WELLS ON REPLEVIN.

In the absence of any comprehensive text-book on the Law of Replevin as administered in the different States of the Union, this work will be found of much use to the practicing lawyer. This will be so, we believe, in spite of the author's style which is abrupt, confused and in many ways ill suited to legal authorship. Mr. Morris' essay has been so far the only real endeavor to present the law of this subject to the American bar, and it has been found of but little practical value being entirely local in its treatment and aim. Mr. Wells' work may be said to cover the whole field and to embrace all the adjudications—over three thousand in all—both English and American. Replevin being as has been said in our own State the only effective remedy for the recovery of personal chattels, it is not strange that the reported cases are as numerous as the book before us shows them to be. The portion of the work devoted to the text covers 430 pages, divided into twenty-five chapters under the following headings: Historical Introduction; General Principles; Requisite of Plaintiff's Right; Possession by Defendant; Joint Owners; Description; Confusion of Goods; Chattel Mortgage; Property Seized for a Tax; Goods in the Custody of the Law; Taking by Theft; The Demand; The Bond Writ and Return; Damages, Parties and Pleading; Replevin of a Distress; The Verdict and Judgment and Miscellaneous.

It is not correct to call this a treatise. Except in the first and the earlier portion of the second chapter no attempt is made to do more than to give a digest of the cases, arranged under different sections. Such sentences as these are frequent: "When the plaintiff said, 'I have come to demand my property, here is a list of it.' *Held*, sufficient." (§ 375.) "When demand was made upon the retiring deacon of a church that he surrender the communion service he replied he 'would take the advice of counsel.' *Held*, right and prudent." (§ 378.) In a treatise we might expect to find these in the notes supporting some general principle stated in the text; but in the body of the book they are out of place. They illustrate moreover a hastiness in preparation which is always present where thoroughness is absent, and which consequently in the present instance prepares us for sections stating cases to which the author has neglected to append the citations (as in § 505), and for an omnibus chapter at the end of the work into which everything which could not be placed under any of the former sections or chapters is indiscriminately crammed. Notwithstanding all this, so small a portion of the field had been previously covered, that Mr. Wells' book will be found an almost indispensable guide to the adjudications.

A Treatise on the Law of Replevin as Administered in the Courts of the United States and England. By H. W. Wells. Chicago: Callaghan & Co. 1880.

DANIELL'S CHANCERY PRACTICE.

"The work, a new edition of which is now offered to the public, has an established reputation, and fills a place in the professional library occupied by no other book. It contains, it is true, much that is purely local to the practice of the English High Court of Chancery, and even more based on recent British legislation and orders of court, all of which may be said to have little or no application to the American equity system. But it is precisely because the work is thus complete, giving us the old English practice in chancery, with the modern changes, that is indispensable to the judge, the practitioner and the diligent student. If is impossible to thoroughly master a difficult point of practice, or even to apply with intelligence a well settled point, without understanding its origin and

Pleading and Practice of the High Court of Chancery. By the late Edward Robert Daniell, Barrister at Law. Fifth American Edition with Notes and References to American decisions: An Appendix of Precedents and other additions and improvements, adapting the work to the demands of American Practice in Chancery. Based on the Fourth American Edition. By J. C. Perkins, LL.D. By W. F. Cooper, LL.D. In three volumes. Boston: Little, Brown & Co. 1879.

tracing it through all its changes, legislative and judicial. From no other work can the necessary information be obtained, except the 'learned and accurate' treatise of Mr. Daniell, as adapted to the American practice by the late Judge Perkins." In these words the present editor of this standard treatise sets forth in brief language the value of the work. Few English law books are better known to the American bar; few are more frequently consulted than the three volumes of Daniell's Practice. The present edition will rank ahead of all previous editions. Its editor is perhaps the most learned, as he is the most distinguished, equity lawyer in the United States. Chancellor Cooper—for thus he will always be styled, though as one of the judges of the Supreme Court of Tennessee, another title now belongs to him—Chancellor Cooper has acquired a reputation in this department of the law second only to Judge Story. Fresh from his hands this great work will arouse a new interest, and few of the profession who are in the habit of using these volumes will hereafter be long contented with the earlier editions.

The labors of the American editor have brought the American authorities down to the present time—2,500 since the last edition. He has particularly enlarged such questions of practice as have increased in importance during the last few years—injunctions in tax and bond cases, receivers, cross-bills, for example. He has recast, in many instances, the old notes, and has revised the whole work carefully and thoroughly. A book so familiar to the profession needs no eulogy. An editor so distinguished requires no introduction. Works like this defy the critic's pen.

THE AMERICAN REPORTS.

The twenty-ninth volume of this valuable series contains cases from nineteen volumes of reports and from fifteen States. Of its usefulness to the profession and the excellent manner in which it is prepared we have more than once spoken, and hence are not called upon to say more than that the volume before us contains an unusual number of decisions upon novel questions, and that the editor's notes are fully up to the standard of the previous volumes.

Among the cases of general interest which have escaped our attention before and have not been already noted in these columns, are the following: The subject of a pledge being divisible, if the pledgee sells more than is necessary to satisfy the debt he is liable in damages to the pledgor. *Fitzgerald v. Blocher*, 32 Ark. 742. A court of equity will restrain the carrying on of an offensive slaughter-house. *Monke v. Hofeman*, 87 Ill. 450. A passenger on a steamboat chartered for a picnic, undertook to sell refreshments on the boat, which the captain forbade, and put the articles in the baggage room. On arriving at the landing, on account of the crowd, the captain was unable to deliver her the articles and she lost their sale. It was held that no action would lie. *Smallman v. Whitter*, 87 Ill. 545. A kept in his factory-yard a fierce dog, which was fastened in the day time and loose at night. B, a night watchman of A, opened the gate every morning. C, A's engineer, loosed the dog at night, notifying B, and fastening him in the morning. One morning B not knowing that the dog was loose opened the gate, and was attacked and injured: *Held*, that he could recover notwithstanding the negligence of C. *Muller v. McKesson*, 73 N. Y. 195. A policy of insurance provided that the insurers should not be liable for any loss occasioned by the use of kerosene oil in any form. The insured went into his barn at night, with a kerosene lamp, to catch fowls, which exploded and the barn was destroyed: *Held*, that if the loss was occasioned by the use of kerosene oil rather than any other oil, the policy was avoided. *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310. A railroad employee injured by a bridge while standing on the top of a car can not recover. The company is not bound to build its bridges high enough to enable its employees to stand up safely on the tops of its cars. *Baylor v. Delaware etc. R. Co.*, 11 Vroom, 23. A municipal corporation, independent of legislative authority, may forbid the erection or compel the removal of buildings constructed of combustible materials within the densely built portions of the town. *Mayor of Monroe v. Hoffman*, 29 La. Ann. 651. The taking effect of a statute affecting a particular county alone may constitutionally be made dependent upon the popular vote of that county. *Com. v. Weller*, 14 Bush. 218. A statute providing that any person who lost money to another may recover it, will not include the proprietor of a faro bank who has lost money to persons betting against the bank. *Brown v. Thompson*, 14 Bush, 538. A city ordinance requiring the owner of a dog to obtain a license for keeping the same and subjecting him to arrest, fine and imprisonment for not procuring such license is invalid. *Mayor of Washington v. Meigs*, 1 McArthur, 53. A statute forbidding the reservation of seats at public exhibitions, upon the sale of tickets of admission after the opening of the doors, is unconstitutional. *District of Columbia v. Saville*, 1 McArthur, 581.

The American Reports, containing all Decisions of General Interest decided in the courts of last resort of the several States, with Notes and References. By Irving Browne. Vol, 29. Albany: John D. Parsons Jr. 1880.

NOTES.

——Mr. Justice Bradley, says the New York *Tribune*, was the oldest of eleven children brought up on a scanty farm in the interior of New York. He inherited an affection for mathematics, and conquered algebra at home without a teacher, in the intervals of charcoal burning.——Of Chief Justice Oliver Ellsworth it is related that he was a devoted snufftaker, and at one time believing that he took too much he tried to break the habit. He carried his box to the garret and deposited it on the top of the garret stairs, obliging himself to ascend and descend two flights of stairs every time he wanted a pinch. But he soon found this took up too much time, and he returned the box to his pocket.

—Charles J. Folger at present one of the associate judges of the New York Court of Appeals has been appointed chief justice, *vice* Sanford E. Church, deceased. In 1870 he was elected a judge of the Court of Appeals. His opinions as a member of that court have been highly regarded by the lawyers of the State. His term as an associate judge expires in 1884. Under the Constitution his term as chief justice ends on December 31, when he will be succeeded by a chief justice to be elected in November. Mr. Folger will then resume his place of associate judge, temporarily filled by the appointment of Francis M. Finch of Ithaca, N. Y.